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In the Supreme Court of the United States

No. 453.
OCTOBER TERM, 1966.

JOSEPH P. RUTH, an individual,
Petitioner,

vs.

BLUE RIVER CONSTRUCTORS, an unincorporated association, and MID-VALLEY, INC., S. A. HEALY CO., J. A. JONES CONSTRUCTION COMPANY, A. S. HORNER CONSTRUCTION CO., INC., CHAS. H. TOMPKINS CO., COLORADO CONSTRUCTORS, INC., co-members comprising the unincorporated association BLUE RIVERS CONSTRUCTORS, and THE CITY AND COUNTY OF DENVER, acting by and through its BOARD OF WATER COMMISSIONERS,

CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado, acting by and through its BOARD OF WATER COMMISSIONERS, Third Party Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY and THE AETNA CASUALTY AND SURETY COMPANY, Third Party Defendants,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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September 16, 1966.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

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OPINIONS BELOW.

The opinions are as follows:

Memorandum Decision of District Court filed October 18, 1963 (R. (D. C.) 6).*

* All references to the record will be (R. (D. C.) __) for Transcript of Record of District Court and (R. (Ct. App.) __) for the Transcript of Record of the Circuit Court of Appeals in the 10th Circuit.

Order of District Court entered December 31, 1963 (R. (D. C.) 42).

Order dismissing appeal as a voluntary act of plaintiff and stipulation (R. (D. C.) 48).

Memorandum Decision Denying Motion for New Trial (R. (D. C.) 105).

Order of Dismissal of June 1, 1966 (R. (Ct. App.) 15).

Order Denying Rehearing of June 14, 1966 (R. (Ct. App.) 22).

JURISDICTION.

Petitioner relies upon 28 U. S. C. Section 1254(1) as his authority and further, we assume, upon Rule 19(b), Revised Rules, Supreme Court.

QUESTIONS PRESENTED.

Petitioner does not present any question in his Petition.

To Respondents, two questions are apparent: (1) Is there a justiciable matter before this Court? (2) Did the Circuit Court of Appeals err in granting appellees Motion to Dismiss under Rule 22 of the Court of Appeals for the Tenth Circuit, or in refusing to grant a rehearing some two weeks later?

STATUTES AND REGULATIONS INVOLVED.

Respondents believe that if Petitioner is entitled to relief he must prevail under Rules 59 or 60, Fed. R. Civ. P.

STATEMENT.

This litigation was commenced by Petitioner on January 21, 1960 in the District Court for the District of Colorado (Case No. 6679, Civil). Petitioner alleged infringement of a certain patent and sought relief against the defendants in the form of an injunction and damages. The case was tried to the court in the spring of 1963 and a

memorandum decision in favor of defendants was written by District Court Judge A. Sherman Christensen and filed on October 18, 1963 (R. (D. C.) 6-28). In outline form the material proceedings following the District Court decision have been:

1. Motion for a new trial filed by plaintiff-petitioner Oct. 28, 1963 (R. (D. C.) 30).
2. Order denying Motion for new trial Nov. 15, 1963 (R. (D. C.) 33).
3. Notice of appeal under Rule 73(b) to Court of Appeals filed December 5, 1963 (R. (D. C.) 35).
4. Order of District Court denying relief under Rules 59 and 60, Fed. R. Civ. P., filed Dec. 31, 1963 (R. (D. C.) 42).
5. Order dismissing appeal as a voluntary act of plaintiff and Stipulation to that effect filed Feb. 11, 1964 (R. (D. C.) 48).
6. Motion for new trial filed in District Court by defendant Ruth on Jan. 31, 1966 (R. (D. C.) 49).
7. Memorandum decision denying Motion for new trial filed Feb. 8, 1966 (R. (D. C.) 105).
8. Notice of appeal and Motion Requesting that Judge Christensen disqualify himself. Mar. 3, 1966 (R. (D. C.) 115).
9. Motion to Dismiss under Rule 22 of the Circuit Court of Appeals filed by appellees on April 21, 1966 (R. (Ct. App.) 4).
10. Order granting Motion of Appellees to dismiss filed June 1, 1966 (R. (Ct. App.) 15).
11. Further request not to dismiss filed by appellant Ruth on June 6, 1966 and treated by the Court as an application for reconsideration (R. (Ct. App.) 16).
12. Order denying application to reconsider denied June 14, 1966 (R. (Ct. App.) 22).

After the order of June 14, 1966, Ruth filed his Petition for Writ of Certiorari on Aug. 17, 1966.

ARGUMENT.

The first question is whether there is a justiciable matter which could be brought before this Court by Petitioner Ruth. Petitioner agreed to dismissal of the case in the 10th Circuit in 1964, and an order and stipulation were entered to that effect (R. (D. C.) 48). Then Petitioner Ruth, in an effort to revive the case 23 months later, filed a motion for a new trial in the District Court which was correctly dismissed (R. (D. C.) 49, 105). The force and effect of Ruth's Petition to this Court depends upon the validity of the motion filed in 1966. Clearly, Ruth's motion was not filed within the time allowed by the Federal Rules of Civil Procedure. Rule 59(b) provides that motions for a new trial be served within 10 days of the entry of judgment; Rule 60(b) provides that for causes (1), (2) and (3) the motion must be filed not more than one year after judgment was entered. Petitioner Ruth has not indicated any reason for being granted relief under Sections (4), (5) or (6) of Rule 60(b). Thus, as Petitioner's motion for a new trial was not timely and there was no cause for delay, the action was defective on its face. Accordingly Petitioner's request for a Writ of Certiorari to this Court is an attempt to have a nullity reviewed by this Court and should be denied.

Further, the Petitioner voluntarily dismissed his appeal in 1964 from the order denying a motion for a new trial entered Nov. 15, 1963 (R. (D. C.) 35 and 48). This is essentially the same relief Ruth now seeks.

Petitioner Ruth has had his day in court and the Petition and record do not disclose any new evidence or facts which would entitle him to relief.

The second question is whether the Court of Appeals erred in granting appellees motion to dismiss in June, 1966?

Petitioner's bids for a new trial have been reviewed six times: (R. (D. C.) 33); (R. (D. C.) 42); (R. (D. C.) 48); (R. (D. C.) 105); (R. (Ct. App.) 15); (R. (Ct. App.) 16). There is no reason why Respondents should be put to further expense to provide Petitioner with a forum to publish his views about General Motors and buses on city streets. Ruth has consistently ignored that his basic claim is a patent infringement suit between parties. It is not a proceeding or hearing involving "the disclosure of a public health hazard from diesel exhaust" (Pet. p. 9). A review of the decisions of Judge Christensen and the orders of the 10th Circuit Court of Appeals indicate that the courts have been patient in their treatment of Ruth and liberal in their interpretation of his letters and pleadings. For example, the order of Judge Christensen filed December 31, 1963 indicates that he treated a letter to the Court as a motion for relief under Rule 59 or Rule 60, Fed. R. Civ. P. (R. (D. C.) 42). See also the Memorandum Decision Denying Motion for New Trial filed February 8, 1966 (App. A to Pet.). (There is an apparent error in the decision as reported in the appendix. In the first line it reads: "On Feb. 8, 1966,"—this should be January 31, 1966, see (R. (D. C.) 105).

Finally, Ruth at the outset of the Questions Presented Section of his Petition states that:

> "This writ, if granted, will force the disclosure of the hidden public health hazard resulting from the indiscriminate discharge of the 0.1% of toxic anhydrous nitric acid gas inherent in diesel bus exhaust (Exh. 9), which by industrial hygienists is rated 20 times more toxic than is carbon monoxide in gasoline automobile exhaust (Exhibit 10)."

The balance of the section continues along the same lines and fails to state any question that this Court could recognize under Revised Rule 19(b).

For the foregoing reasons, Respondents request that the Court not grant the Petition.

Respectfully submitted,

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Counsel for Respondents.

September 16, 1966.

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FIREMAN'S FUND INSURANCE COMPANY and THE AETNA CASUALTY AND SURETY COMPANY, **Third Party Defendants,**
Respondents.

REPLY BRIEF OF PETITIONER

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October 3, 1966

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Respondents.

REPLY BRIEF OF PETITIONER

When I found out Mr. G. A. (Bud) Franz was to be a witness for Mr. Donnelly, I gave Mr. Ownbey a copy of my certified copy of Jack Torrey's analysis of the Idarado mine air (Exhibit 11) in which Mr. Franz participated as the local Idarado mine inspector in the report as of April 19, 1951. I also gave him the certified death certificates of miners who had died as a result of the concentration of oxides of nitrogen in the mine which Mr. Torrey testified were five times tolerance. I also gave him the coroner's report on the death of Aiden Connors, who fell 200 feet down a raise without ladderways and landings every 20

feet as provided by Colorado mining law. Mr. Franz, now Commissioner of Mines, permitted the Idarado Mining Co. to construct this illegal raise in violation of the Colorado mining law. At the coroner's inquest he was asked by the coroner if he had anything to say and he said "I guess not." My attorney did not have him verify the Torrey report or cross-examine him. A miner overcome by diesel fumes falls down an illegal raise and he, responsible for the miners' safety, says nothing.

Big corporations can buy anything they want in Colorado. Franz watched miners struggle for breath and die from General Motors diesel exhaust for years and did nothing. I wanted my attorney to ask him why, when he had it in his police power to prevent, he did not prevent the miners from being injured from diesel exhaust five times tolerance.

The Industrial Commission is the worst thing that ever happened to labor. Three semi-permanent politicians can be bought off—whereas it is infinitely more difficult to buy off a transient viable jury of citizens. Abolish this counterfeit short cut to justice. The United States would not now be wallowing in a welter of toxic smog from General Motors diesel exhaust if Tony Amato, et al., had testified before a petty jury instead of an industrial commission.

No American should die fighting to foist our diseased democracy on another nation until this cancer is cut out of our otherwise venerable democracy.

This, together with my attorneys' refusal to permit me to demonstrate Exhibit 59 to the Court, convinced me my attorneys had defected to Mr. Donnelly and were dedi-

cated to the hiding of the deadly oxides of nitrogen inherent in diesel exhaust for General Motors as the Colorado Industrial Commission, et al., did.

At the pretrial demonstration it was decided by my attorneys not to demonstrate Exhibit 59, but I could blow up the graph of Exhibit 59 and with a pointer explain "59" to the Court from an easel. I was not given an opportunity to make this demonstration, and at the close, Saturday, Mr. Manter lifted this 18" x 24" exhibit mounted on cardboard from the easel and carried it from the court room. (Exhibit ~~23~~ 27.) At the outset Judge Christenson said he would stay over if necessary.

By my attorneys' decision, Judge Christenson did not witness and observe the chemical and physical demonstration of Exhibit "59" which absorbed the anhydrous nitric acid gas from the diesel exhaust and the limestone thereafter continually automatically detoxifying it.

Mr. Justice Holmes in *Mineral Separation North American Corporation v. Magma Copper Company,* 280 U.S. 400, says, "There is no 'of course' as to what nature can do except as proved by observation and experiment."

My attorneys denied me the right to give to the Court the opportunity to observe the chemical reactions that transpired in the functioning of my chemical patent method of making diesel exhaust nonhazardous and proving it to be the toxic nitric acid gas in the diesel exhaust by the classic diphenylamine method (Scott's Analysis, page 631).

Judge Druffel, in holding my patent valid, observed from Exhibit "59" what Mr. Justice Holmes said was